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No. 80-6045

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RUBIN KREMER,

Petitioner,

-against-

CHEMICAL CONSTRUCTION CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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February 26, 1981

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PRELIMINARY STATEMENT

The Brief in Opposition attempts to treat this case as if petitioner were seeking "license" for the Federal courts "to review the judgments of state courts" (Brief at 21). Petitioner seeks no such thing. The only state court "judgment" here was a ruling that the state administrative decision dismissing petitioner's state discrimination complaint was not arbitrary, capricious or an abuse of discretion. This Title VII action is not a collateral attack on that judgment. Rather, it is an assertion of an independent Federal statutory right--a right that Congress intended to include a trial de novo in Federal court.

In trying to support its mistaken "collateral attack" theory, respondent argues that this Court did not really mean what it said when it repeatedly and unanimously recognized the right to a de novo Federal trial. Indeed, the Brief in Opposition only underlines the importance of the questions presented here and the need for clarification of the scope of that right.

ARGUMENT

1. This is an action to enforce a Federal statutory right which encompasses the right to a de novo Federal court hearing; it is not a collateral attack on a state judgment. All that petitioner is seeking is to have a court hear the merits of his discrimination claim for the first time. Mr. Kremer is not relitigating the one issue that was actually decided by the New York state courts--whether the NYHRD acted arbitrarily or capriciously. This is not an attempt to retry issues in Federal court by means of a collateral attack on the judgment of a state court, rendered after a full adversarial judicial hearing on the identical issues, as was the case in Allen v. McCurry, ____ U.S. ____, 66 L. Ed.2d 308 (1980), cited by respondent.* Thus, the mechanical application of the full faith and credit provisions of 28 U.S.C. § 1738, as advocated by respondent, is inappropriate here.

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* In addition, the claim raised in Allen was that the plaintiff, who had been convicted of assault and possession of heroin in state court, had been the victim of a search violating the Fourth Amendment. There was no claim of unlawful discrimination. Finally, as discussed below, Allen was an action brought under 42 U.S.C. § 1983, to which the Title VII de novo hearing requirement does not apply.

More importantly, whatever the applicability of § 1738 in other situations where there has been state appellate review of administrative determinations, it is overriden here by the intent of Congress in enacting Title VII. Respondent asserts that there is no "exception to the normal applicability of res judicata in actions under 42 U.S.C. §§ 1983 and 1981" (Brief at 20). Even if true, this assertion is irrelevant in a Title VII action.*

Respondent concedes, in effect, that a Congressional "intent" to mandate de novo Federal hearings in Title VII cases would override § 1738 (Brief at 16-17). But respondent goes on to claim that when this Court found that Congress had precisely that "intent", see Chandler v. Roudebush, 425 U.S. 840 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), its holdings were distinguishable. Respondent is wrong in that contention, as two courts of appeals concluded when they refused to follow Sinicropi and created a circuit conflict.**

Moreover, in relying on the inapposite Allen case, respondent ignores the directly relevant decision last term in New York Gaslight, Club Inc. v. Carey, ____ U.S. ____, 64 L. Ed.2d 723 (1980). In that case, the plaintiff, like Mr. Kremer, filed a discrimination charge

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* For this reason, also, respondent's heavy reliance on Allen v. McCurry, supra, a § 1983 collateral estoppel case, is misplaced.

** See Smouse v. General Electric Co., 626 F.2d 333 (3d Cir. 1980); Gunther v. Iowa State Men's Reformatory, 612 F.2d 1079 (8th Cir.), cert. denied, ____ U.S. ____, 100 S. Ct. 2942 (1980), discussed in the Petition for Certiorari at 8, 10-11, 17.

with the EEOC, which referred it to NYHRD. NYHRD investigated and, unlike this case, held a public hearing and found that there had been discrimination; it ordered back pay and an employment offer. On defendant's appeal, both the Appeals Board and the Appellate Division approved NYHRD's determination. However, while the state court appeal was still pending, the plaintiff went to Federal court on the same charges.

This Court ultimately held that the Federal court plaintiff could recover attorneys' fees incurred in state administrative proceedings--a question described as "significant to the enforcement of the antidiscrimination provisions of Title VII", id. at 732.

In reaching that holding, this Court analyzed the structure of Title VII specifically in light of the same New York procedures that are at issue here. In that context, it cited extensively from the Alexander decision (which respondent would not follow) and noted, among other points, that:

> "Title VII establishes a comprehensive enforcement scheme in which state agencies are given 'a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination.' Oscar Mayer & Co. v. Evans, 441 U.S. 750, 755 (1979)." 64 L. Ed.2d at 734.

As demonstrated in the Petition for Certiorari at 17-18, the inevitable result of the decision below will be to "undermine Congress' intent to encourage full use of state remedies", since "almost all Title VII complainants would abandon state proceedings", id. at 736 n.6, without seeking judicial review, in order to preserve their Federal rights.

Even more significantly, this Court considered "the propriety of EEOC's issuance of the right to sue letter", id. at 735 n.5--an essential prerequisite to bringing a Federal court action. That issue was raised by the district court's statement that it was "'very doubtful'" whether the EEOC should have done so "while state proceedings were pending", id. at 731. This Court "disagree[d] with the District Court":

> "As we read the statute, the Commission was required to issue the letter after 180 days, regardless of the posture of any state proceedings." Id. at 735 n.5.

It follows that a Title VII action may be brought "regardless of the posture of any state proceedings". The Federal court then has power to afford relief, otherwise available under Title VII, that has not been granted by the state. In this case, where the "state proceedings" gave no relief, the Federal court has power to grant petitioner the full panoply of Title VII remedies; it cannot dismiss his case without reaching the merits of his claim.

2. The right to a trial de novo exists regardless of the powers of a state agency or the pursuit of sharply limited state court appeals. Respondent asserts that the combination of a state administrative determination (if the state agency has "plenary" powers) and appellate review of that determination under an "arbitrary and capricious" standard is tantamount to the Federal trial de novo mandated by Congress. Lacking in the cases or legislative history, this assertion is, moreover, simply illogical.

First, even respondent admits that NYHRD's so-called "plenary" powers are exercisable only when there has been a hearing.* But in this case, there was no hearing. Thus, the supposed availability of any "plenary" powers of the NYHRD is irrelevant here.**

In any event, petitioner did not lose his right to a de novo hearing when--acting pro se and indisputably having met all of the complex procedural prerequisites to

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* Despite respondent's characterization, the fact is that NYHRD's powers are not "plenary" as compared to those of a Federal court acting to enforce Title VII. Thus, as amicus below, the EEOC described the New York procedures as "precisely those which Congress rejected for enforcement of Title VII and which are inadequate to replace the federal scheme", Pet. A. 58. And the EEOC characterized the treatment accorded Mr. Kremer by NYHRD as "a perfunctory ex parte administrative investigation", ibid. These descriptions of NYHRD's procedures by the EEOC--the expert in the field--hardly comport with respondent's portrayals.

** Respondent criticizes Mr. Kremer for failing to use NYHRD regulations that supposedly allowed issuance of subpoenas. There is no suggestion, however, that Mr. Kremer was ever informed of this right. In fact, both NYHRD and the Appeals Board ignored the lists of witnesses that Mr. Kremer repeatedly submitted to them.

Furthermore, the relevant provision of the NYHRD regulations is not mandatory. It provides only that subpoenas "may be issued" at the request of a party. More importantly, "[i]ssuance of a subpoena duces tecum at the instance of a party who appears without attorney"--as petitioner did--"shall depend upon a showing of necessity". 9 N.Y.C.R.R. § 465.12(c) (1977); see also 9 N.Y.C.R.R. § 465.10(a) (1975). Respondent's suggestion that this subpoena power was of any use to Mr. Kremer is thus misleading.

Respondent's further suggestion that Mr. Kremer is to be faulted because he failed to return to the EEOC while awaiting the NYHRD decision is both irrelevant and wrong. In fact, petitioner did attempt to renew his EEOC complaint on March 4, 1977, almost two months before NYHRD rendered its decision, and he renewed it again two days before he filed his state court appeal. See Kremer v. Chemical Construction Corp., 464 F. Supp. 468, 470 (S.D.N.Y. 1978) (Pierce, J.), Pet. A. 30, A. 31.

a Title VII action--he sought to protect his state-created rights by appealing to state court. The Appellate Division had no power to conduct any trial; its review was limited by the "arbitrary and capricious" standard. Thus, the state courts could not and did nct consider the merits of Mr. Kremer's discrimination claim, as Congress has mandated the Federal courts to do. See Petition for Certiorari at 13-17.

Finally, if respondent's reasoning were correct, it would lead to anomalous and patently inequitable results. For example, even under respondent's theory, a plaintiff who receives a full hearing before the NYHRD is free to return to the EEOC and, thereafter, to initiate a Federal court action on the same issue determined in the state hearing, so long as there was no appeal to state court. Indeed, this is true even if the NYHRD finds discrimination and exercises its "plenary" powers. Cf. New York Gaslight Club, Inc. v. Carey, supra. Thus, such a plaintiff might have a full hearing at the state agency level and a trial in Federal court. Yet respondent argues that if a discrimination claim is dismissed summarily by NYHRD and the Appellate Division considers only whether that determination was "arbitrary or capricious", the plaintiff may be denied not only a hearing at the agency level, but also any judicial hearing on the merits of his or her claim. Such a result is inconsistent with the structure and intent of Title VII as it has been repeatedly interpreted by this Court. See, e.g., cases cited at page 3 above.

Thus, New York Gaslight Club, Inc. v. Carey, supra, emphasized once again "the ultimate authority of federal courts to enforce Title VII", 64 L. Ed.2d at 736. It interpreted Title VII to mean that:

> "For example, if state proceedings result in an injunction in favor of the complainant, but no award for backpay because state law does not authorize it, the complainant may proceed in federal court to 'supplement' the state remedy." Id. at 736-37.

Here, even assuming that some Title VII rights could be lost by a state court appeal, state law does not authcrize a trial de novo. Accordingly, Mr. Kremer has not received "satisfactory relief . . . in state forums", id. at 736, and is entitled to obtain such relief--a trial de novo--in Federal court.

CONCLUSION

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

February 26, 1981

Respectfully submitted,

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